

B. A. WILFORD

IBLA 86-223

Decided August 11, 1989

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer NM 63749.

Affirmed.

1. Confidential Information -- Words and Phrases

"Proprietary information." Proprietary information means information which, if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would inhibit the Government's ability to obtain this type of information in the future, resulting in a substantial detrimental effect on a Government program. Internally generated Governmental conclusions and information are not generally proprietary.

2. Oil and Gas Leases: Known Geologic Structure -- Oil and Gas Leases: Noncompetitive Leases

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 336(b) (1982). Where lands are determined to be within such a structure before issuance of a lease, the noncompetitive lease application for such lands must be rejected.

3. Oil and Gas Leases: Known Geologic Structure -- Oil and Gas Leases: Noncompetitive Leases

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

APPEARANCES: Gregory J. Nibert, Esq., and Douglas L. Lunsford, Esq., Roswell, New Mexico, for appellant; Margaret C. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

B. A. Wilford has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated November 21, 1985, rejecting her noncompetitive oil and gas lease application NM 63749. Appellant's application was drawn with first priority for parcel NM 359, embracing the W 1/2 of sec. 29, T. 23 S., R. 30 E., New Mexico Principal Meridian, Eddy County, New Mexico, on the June 1985 list of parcels available for simultaneous filings. The New Mexico State Director, BLM, based his decision upon a memorandum dated November 1, 1985, from the Roswell District Manager, BLM, stating that the lands sought had been determined to lie within an undefined addition to the Malaga Known Geologic Structure (KGS), effective August 7, 1985.

By letter dated January 14, 1986, appellant requested a copy of the geological evaluation upon which BLM based its decision, including "any geological evaluations, isopach maps, and other documents which will show or explain the BLM's decision to include the above described lands in the KGS" (Letter dated Jan. 14, 1986, from appellant to BLM). BLM responded to appellant's letter on January 31, 1986, explaining the basis for its KGS decision as follows:

The K.G.S. action affecting said lease offer is based on a study of the Morrow Formation. This formation was chosen for study based on the facts that the majority of the wells in the study area produced or are producing from the formation and the overall extent and mapability of the formation throughout indicated that structure played little or no part in the entrapment of hydrocarbons and therefore the Morrow reservoirs are stratigraphic in nature. Information obtained from individual well reports and completion reports reveal that the Morrow contains multiple, stacked pay horizons. Indeed, this fact is further substantiated by the cross sections made throughout the study area. With the above in mind, it was decided that a net pay isopach map on a producing interval of the Morrow Formation would best depict the areal extent of presumptive production. The criteria used for the net pay map is a clean sand cutoff of equal to or less than 60 API units on the gamma ray logs and the presence of gas effect cross-over on the FDC/CNL logs. Other considerations were such things as production and test data as well as the presence of porosity and/or permeability. All of the wells * * * including plugged and abandoned wells used for the isopach map have or are producing, or have test data, well log interpretations, and/or core data which indicate the presence of hydrocarbons in the isopached interval. Hence the isopach map reflects the area of possible hydrocarbon accumulation. All 40 acre subdivisions within or cut by the "O" isopach are considered

K.G.S. lands. The subject lands of lease offer NM-63749 are well within the "O" isopach and are therefore considered K.G.S. lands.
(Letter dated Jan. 31, 1986, from BLM to appellant). BLM informed appellant that it considered the geologic interpretations and report to be proprietary and confidential information.

In her statement of reasons (SOR), appellant argues that her lease is not within an area which meets the criteria for a KGS, as defined at 43 CFR 3100.0-5(1). Appellant quotes James Muslow, Sr., 51 IBLA 19 (1980), for the proposition that there must be a "continuous entrapping structure on some part of which there is production," and refers to Angelina Holly Corp., 70 IBLA 294 (1983) (J. Burski, concurring), and John P. Brogan, 85 IBLA 379 (1985), for the principle that in determining whether lands are proper for KGS designation, "[t]he test is whether the land overlies a structure on which production is established" (SOR at 3; emphasis in original).

Appellant asserts that the "Geological Evaluation" of the subject land prepared on her behalf by William J. LeMay, Certified Professional Geologist, "clearly and definitely shows that the lands in question do not over-lie a structure or trap in which there is production" (SOR at 3). According to appellant,

Mr. LeMay shows that the wells on lands in which there is any production in the surrounding area are producing from reservoir rock that has a very limited areal extent and such reservoirs are discontinuous to the lands under consideration. These facts definitely indicate a very limited reservoir which is incapable of being classified as a producing oil or gas field. For all practical purposes the Skelly No. 2 Forty Niner Ridge Unit well and the Texaco No. 1 Remuda Basin well, which are the closest producing wells, do not have production on which a presumption of productivity may be based and applied to adjacent lands, including the lands covered by lease offer NM 63749.

(SOR at 4). Appellant maintains that "for a proper KGS determination to be made there must be geological evidence of the existence of a continuous entrapping structure or multiple overlapping producing intervals, either stratigraphic or structural in nature, on which there is production" (SOR at 5-6).

Appellant concludes that she "has offered evidence that proves by a preponderance of the evidence that the BLM decision to include the lands in lease offer NM 63749 in an undefined KGS is erroneous" (SOR at 7). She emphasizes that BLM based its KGS decision upon a conclusory report, and that she "has requested, but was refused, supporting documentation on the rationale and geological basis upon which the lands in Appellant's lease offer were included in an undefined KGS" (SOR at 7). She concludes that "[t]he technical data submitted * * * shows by a preponderance of the evidence that the lands in question cannot reasonably be considered to be in an area where the presumption of productivity would exist" (SOR at 9).

In his "Geological Evaluation," LeMay concludes that the W 1/2 of sec. 29, T. 23 S., R. 30 E., New Mexico Principal Meridian, should not be presumed to be commercially productive of oil or gas. He states as follows:

Utilizing my 29 years of geological experience in Southeast New Mexico where I have analyzed over 200 wells drilled in the Delaware Basin, I have applied this experience to my analysis of the subject area. Although it cannot be stated with certainty that the W/2 of Section 29 will not produce commercial hydrocarbons, the preponderance of the evidence shows that the general area is underlain by a series of small, tight, discontinuous reservoirs which trap minor amounts of non-commercial oil and gas at some localities * * *.

There are six formations producing oil or gas in the general area which are listed on the enclosed Production Data Map. The W/2 of Section 29 lies 1-1/2 miles from the closest well being The Skelly No. 2 Forty Niner Ridge Unit (21-25-30), a 14,000 foot test drilled in 1974 and initially completed in the Morrow sandstones from 13,805 to 14,156 feet. The well produced only 42-1/2 million cubic feet of gas before being recompleted in the Bone Spring formation in 1977 from the interval 7,514 to 7,568 feet. Since 1977 the well has produced approximately 14,000 barrels of oil and has been producing oil at the rate of 3 to 4 barrels per day for the past two years which yields little if any profit to the operator. Considering the cost to drill and complete this well, the operator has recovered no more than 10% of his original investment. This well must be considered a failure because the Morrow and Bone Spring producing reservoir rock extends only a short distance beyond the well bore. The producing reservoirs are poorly developed and discontinuous.

Approximately 1-1/2 miles Northwest of the subject land in Section 24, T-23-S, R-29-E, Texaco drilled their No. 1 Remuda Basin in 1960 to a total depth of 15,144 feet. After failing to recover hydrocarbons in the Pennsylvanian and Devonian by drill stem tests and completion attempts, Texaco completed from the Wolfcamp formation from perforations 11,111 to 11,180 feet. In 1962 they recompleted from the Wolfcamp interval 11,419 to 11,452 feet. The well has made slightly over 42,000 barrels of oil in the past 25 years. This well must also be considered a failure because the limestone reservoir rock in this well extends only a short distance beyond the well bore. The Wolfcamp reservoir rock is discontinuous limestone lenses.

Other wells in the area vary in commercial significance. It is important to note that there is no continuous trapping mechanism in this area. Offset wells encounter different gas and oil bearing zones. These zones are discontinuous in development and extend only a short distance beyond their respectful well bores.

The Atoka and Morrow sands have produced commercial amounts of gas in the Nash Draw field 2-1/2 miles Northwest of the subject acreage but these sands are discontinuous and cannot be projected into the W/2 of Section 29 (Texaco Remuda Basin was dry in Atoka and Morrow formations).

The enclosed Structure Map shows only regional dip to the Southeast. Trapping of hydrocarbons in the Atoka and Morrow sandstones is entirely stratigraphic in this area. There are many sands in the Atoka and Morrow formations but very few of them develop into reservoir quality rock and those that do have a very limited area extent in the subject area (estimated 50 to 320 acres). A. I. Levorsen defines a "stratigraphic trap" as follows: "Stratigraphic trap is a general term for traps that are chiefly the result of a lateral variation in lithology of the reservoir rock, or a break in its continuity". (From SEG and AAPG Special Publication No. 10 * * *). The reservoir rock must have adequate porosity and permeability to be classified as reservoir rock and must contain oil or gas, not water, to be considered "pay". Not all sands in the subject area can be called reservoir rock. Those few sands that do develop reservoir characteristics have very limited areal extent because they either pinch out into adjacent shale bodies, change facies, or lose their reservoir quality by becoming clay filled or quartz cemented.

The above criteria has been applied to the Atoka and Morrow sands but the same principles pertain to the Delaware sands, Bone Spring formation, Strawn and Wolfcamp formations. The Cherry Canyon sand (Delaware sand) produce oil in Section 16, T-23-S, R-29-E. Non-commercial Bone Spring production occurs in Section 13, T-23-S, R-30-E, and one Strawn well in Section 13, T-23-S, R-30-E, has produced 9 million cubic feet of gas before being abandoned. In all cases, the reservoir rock has very limited areal extent. The pay zones are not present in adjacent wells as reservoir rock.

(LeMay Geological Evaluation at 1-4).

In its Response, BLM asserts that appellant has failed to prove error in its decision by a preponderance of the evidence. BLM claims that appellant "has failed * * * to provide * * * underlying information, and is instead asking the Board and the Agency to rely solely on the very generalized geological evaluation prepared by Lemay Energy Corporation and two extremely schematic, nondetailed maps" (BLM Response at 1). BLM submitted its supporting data with its response, dividing the data into two sections. BLM sent one section, marked "Proprietary/Confidential Information," to the Board, but not to appellant. BLM served the unmarked section upon appellant. Among the items of proprietary and confidential information is the KGS Report prepared by John Simitz, Geologist, BLM, dated September 17, 1985, upon which BLM based the decision appealed herein.

By memorandum dated February 20, 1986, to the Field Solicitor, the Roswell District Manager, BLM, addressed appellant's arguments and more fully set forth the basis for its KGS determination. BLM's explanation is set forth below:

Examination of the production data revealed that the Morrow contained multiple stacked reservoirs which are incased by shale in the study area. Correlation of the well logs showed that one interval in the Morrow seemed particularly favorable to hydrocarbon entrapment based on gas effect on the FDC/CNL log, porosity and/or permeability, and perforated productive intervals. It was also noted that this interval is present in all the wells used for the study. This interval occurs from 12,985 feet to 13,594 feet * * *.

With this information in mind it was decided to construct a net pay isopach map * * * of the interval and evaluate the area on the basis of well completion reports, test data, cross sections and the isopach map. The criteria used for the net pay isopach map is a clean sand cutoff of less than or equal to 60 API units on the gamma ray logs and the presence of gas effect crossover on the FDC/CNL logs. Other considerations made for the map were such things as the presence of porosity and/or permeability.

The cross sections made in the area for the isopach map show the occurrence of multiple, stacked reservoirs in the Morrow as well as the overlapping nature of the reservoirs within the isopached interval. The appellant and the appellants' geologist contend ". . . that the wells on lands where there is any production in the surrounding area are producing from reservoir rock that has a limited areal extent and such reservoirs are discontinuous to the lands under consideration". Cross sections A-A' and B-B' * * * were made adjacent to lease offer NM 63749 and clearly show the multiple, stacked and overlapping nature of the reservoirs outlined within the isopached interval and furthermore there is at least one reservoir which contains hydrocarbons common to all three wells used for the cross sections. The appellant and his geologist also contend that there is an absence of a continuous trapping mechanism. The cross sections A-A' and B-B' clearly show the existence of several continuous trapping mechanisms within the interval.

All of the wells, including plugged and abandoned wells, used for the isopach map have or are producing from the isopached interval, or have test data, well log interpretations and/or core data which indicate the presence of hydrocarbons. Although Texaco's No. 1 Remuda Basin Unit well was not used for the isopach map, the preceding statement is applicable to it also. The appellant's geologist makes a statement in his report that the No. 1 Remuda Basin Unit well failed to recover hydrocarbons in the Pennsylvanian section, of which the Morrow Formation is a part. This statement appears to be false. Our records indicate that

this well contains two intervals; 13,245 feet to 13,420 feet and 13,675 feet to 13,795 feet which correlate to the isopach interval and had recovered gas on tests * * * of each interval.

The appellant's geologist also makes the statement that, "The subject lands is located 1 1/2 miles from non-commercial production and 2 1/2 miles from commercial production". This statement is not entirely true. Skelly Oil Company's, No. 2 Forty Niner Ridge Unit well located in the SW 1/4 NE 1/4 of section 21, T. 23 S., R. 30 E., N.M.P.M. Eddy County, New Mexico, which is 1 1/4 miles to the NE of subject lands and Mesa Petroleum Corporation's No. 2 Nash Unit well located in the SE 1/4 NW 1/4 of section 18, T. 23 S.R. 30 E., N.M.P.M., which is 1 3/4 miles to the NW of subject lands, produced gas through perforations within the isopach interval from May 1975 to January 1977 * * * and from May 1976 to November 1981 * * * respectively. A third well, Perry R. Bass', Poker Lake Unit No. 59 well located in the SE 1/4 SW 1/4 of section 8, T. 24 S., R. 30 E., N.M.P.M., which is 2 3/4 miles to the S of subject lands is a shut-in well capable of producing * * * through perforations 14,297 feet to 14,325 feet, which correlates to the isopach interval. The boundaries of the subject K.G.S. determination were set by the "O" isopach of the net pay map. All 40 acre subdivisions within or cut by the "O" isopach are K.G.S. lands. At the time of the determination the subject K.G.S. lands were bounded on the North and a portion of the East and West by existing K.G.S. boundaries * * *. The remaining boundaries were determined by virtue of the "O" isopach.

In summary, appellant requested the location of the wells used for the study, the rationale, and the geologic basis for subject K.G.S. determination and appellant was sent the requested information.

The K.G.S. determination affecting lease offer NM 63479 was a consolidation of several existing K.G.S. areas into one area by a geological study of the Morrow Formation. We do not contend that the Morrow reservoir is one continuous reservoir throughout the entire Known Geologic Structure, rather our study found multiple, stacked, and overlapping Morrow producing intervals. The cross sections have shown the above to be true as well as the existence of a continuous entrapping mechanism. Morrow production has been established by the three wells used in the cross sections as well as by other wells in the study area * * *.

(Memorandum dated Feb. 20, 1986, from Roswell District Office, BLM, to the Field Solicitor, at 2-4).

In her response, appellant argues that "it is impossible to extend the limits of a KGS to such a great areal extent where all the geologic evidence reflects that even when there is production, the producing reservoir is very limited and generally does not extend to adjacent wells," and that "BLM's

KGS extension in this case is so great that the limits cannot be based upon competent, defensible and sound geologic analysis because of the limited well control" (Appellant's Response at 8). Based upon a Geological Supplement prepared by LeMay, appellant offers additional arguments as to why BLM's KGS determination is erroneous. In his Geological Supplement, LeMay presents the following evidence:

1. Non-commercial gas production from the Morrow formation in the two closest producing wells to the subject tract (wells in Section 16 and 21, T-23-S, R-30-E). The enclosed Cross Section A-A' (Exhibit "A") shows the sandstones in the Morrow formation to be discontinuous even though these wells are only 3/4 miles apart. The lower two (2) sands on the cross section could be continuous but they are either water bearing or tight and can not be considered net gas pay. The discontinuous nature of the producing gas sands in these wells is further supported by production data contained in my original report and by bottom hole pressure data evaluated in Item No. 2 below.
2. Bottom hole pressures recorded September 30, 1976 which show a bottom hole pressure for the Morrow formation in the No. 1 Forty Niner Ridge Unit (Sec. 16) of 2,252 pounds and a bottom hole pressure in the No. 2 Forty Niner Ridge Unit (sec. 21) of 1,233 pounds. If the gas producing Morrow sands in each well were continuous between the wells the bottom hole pressures would be nearly equal (see Exhibit "A", Cross Section A-A'). A difference of over 1,000 pounds bottom hole pressure in wells 3/4 mile apart indicates separate gas producing reservoir in each well.
3. The Morrow sandstones in the closest wells to the subject tract are not continuous between wells except in rare occasions. Morrow gas bearing sandstones in the Mesa Nash Units No. 1 and 2 in Sections 13 and 18 respectively may be connected between wells because of the higher Morrow gas recoveries from these wells. These pay sands do not extend south into the well bore of the Texaco No. 1 Remuda Basin Unit No. 1 (Sec. 24, T-23-S, R-29-E). Texaco tested these sands by drill stem tests and completion attempts and found them to be non-productive. (See Exhibit "A", Cross Section A-A'). There are two sandstones which appear to correlate throughout the study area (Exhibit "A"). These sands are non-productive however except in the Mesa No. 1 Nash Draw Unit (13-23-29), where the interval from 13,607-609 was perforated and commingled with other gas sands. Additional perforations from 13,751 to 13,776 feet in the Mesa No. 1 Nash Unit recovered water with a small amount of gas on a completion attempt and a bridge plug was set to abandon the zone and complete from gas sands above.
4. Exhibit "B", a field study of the Carlsbad field, by Mr. Rod Anderson of Cities Service Oil Company, in his MORROW SUMMARY on page 25, states that "the sand bodies are erratic [sic], porosities within the sand bodies are erratic [sic], and

the water saturations are unpredictable". This is additional supporting evidence for my interpretation of discontinuance Morrow sandstones. The difference between the Carlsbad Morrow gas field and the subject area is that in the subject area there is an absence of all gas producing Morrow sands in the Texaco Remuda Basin Unit in Section 24, T-23-S, R-29-E. The enclosed cross section shows this. Since this well and the Getty No. 2. Forty Niner Ridge Unit in Section 21, T-23-S, R-30-E, are the closest wells to the subject tract it is logical to assume that there are no gas producing Morrow sandstones underlying the subject tract.

* * * * *

In summary, geologic evidence in the subject area shows that the Morrow formation consists of a series of discontinuous sands, some of which contain only shows of gas which are non-producible, some of which are tight and void of any hydrocarbon show, some of which carry producible water (perforated interval 13,751 to 13,776 feet in Mesa No. 1 Nash Unit, Section 13, T-23-S, R-29-E, on enclosed Exhibit "A") and some sands which contain commercial concentrations of producible gas. In all cases the pay sands are erratic in nature, limited in areal extent and cannot be shown to extend into the W/2 of Section 29, T-23-S, R-30-E. The Texaco Remuda Basin well is a thoroughly tested dry hole in the Morrow. Both Forty Niner Ridge wells in Sections 16 and 21 of T-23-S, R-30-E, have bottom hole pressure that indicates the net pay sands in one well are not in communication with the pay sands in the other well. These three wells are the closest to the subject tract and illustrate the erratic and discontinuous nature of Morrow gas pay sands in the subject area.

(LeMay Geological Supplement at 1-3).

On December 22, 1987, counsel for BLM filed its supplemental response with the Board consisting of a memorandum dated December 8, 1987, from the Roswell District Manager, BLM, to the Field Solicitor, refuting the arguments set forth in appellant's SOR and response as well as LeMay's Geologic Evaluation and Geologic Supplement. Therein, the District Manager states as follows:

The appellant and her geologist maintain that their cross section A-A' submitted with their SOR proves that the Morrow reservoirs do not extend southward to the subject lands because Texaco's Remuda Basin Unit No. 1 well (NE 1/4 SE 1/4 of sec. 24, T. 23 S., R. 29 E., NMPM), located between the Mesa wells and the subject lands, tested the Morrow sandstones and found them to be dry (Appellant's April 10, 1986 response at 12). This is not correct. As we stated previously in this case, this well tested several intervals of the Morrow sandstones and did test positive for hydrocarbons as shown by in exhibits No. G1 and G2 contained in our first response. The well was not used in our study due to its location with a pre-existing K.G.S. area. Even if this well

were used, and considered to be a dry hole (which would make the well a "O" point), the resulting realignment of the "O" isopach line would still include the subject land within the K.G.S. area.

Even if the preceding information were not known, the appellant's geologist states that the No. 1 Forty Niner Ridge Unit well (located in sec. 16, T. 23 S., R. 30 E., NMPM, Lea County) and the No. 2 Forty Niner Ridge Unit well (located in sec. 21, T. 23 S., R. 30 E., NMPM, Eddy County) are the two closest producing wells to the subject lands. Both of these wells have produced from the isopached interval in the Morrow Formation. Due to their closer location we feel they should carry more influence on the subject lands than the No. 1 Remuda Basin well. Appellant's contention that production from these wells were "non-commercial" is of no consequence in a K.G.S. determination. Beard Oil Co., 99 IBLA 40 (1987). A determination that certain lands are in a K.G.S. of a producing oil and gas field does not guarantee the productive quality of those lands. Such a determination only announces that on the basis of geological evidence the Department has found that a certain structure has trapped accumulated oil and gas. K.G.S. designation recognizes the existence of a continuous entrapping structure on some part of which there is production. K.G.S. designation does not indicate what is known of the productivity of the lands in the structure. Nor does it predict future productivity. James Muslow, 51 IBLA 19 (1980); Vernon Benson, 48 IBLA 64 (1980), and Lynn, 61 IBLA 153 (1982). Whether or not production is commercial is not a consideration, and the term "net pay" carries no economic implications when used in a K.G.S. study. BLM's use of the term "net pay" is synonymous with "net presumptively production interval." This is consistent with Beard Oil Co., 99 IBLA 40 (1987).

(Memorandum dated Dec. 8, 1987, from the Roswell District Manager to the Field Solicitor, at 2).

[1] Before turning to the merits of BLM's KGS determination in this case, we will address appellant's argument that BLM improperly withheld information under 43 CFR 3162.8. The relevant provisions of 43 CFR 3162.8 are set forth below:

(a) Information obtained pursuant to this part and on file shall be open for public inspection and copying during regular office hours upon a written request, pursuant to rules at 43 CFR Part 2, except that:

(1) Upon request, information obtained from a lessee under this part that constitutes trade secrets and commercial or financial information which is privileged or confidential or other information that may be withheld under the Freedom of Information Act (5 U.S.C. 552(b)), such as geologic and geophysical data and

maps, shall not be available for public inspection or made public or disclosed without the consent of the lessee for a period of 12 months;

(2) Upon expiration of the 12-month period, the lessee may request that the data be held confidential for an additional 12-month period; and

(3) Upon termination of a lease, whether by expiration of its terms or otherwise, such information shall be made available to the public.

(b) Information requested to be kept confidential under this section shall be clearly identified by the lessee by marking each page of documents submitted with the words "CONFIDENTIAL INFORMATION" at the top of the page. All pages so marked shall be physically separated from other portions of the submitted materials. All information not marked "CONFIDENTIAL INFORMATION" will be available for public inspection.

In her response to BLM's response, appellant concedes that certain information may be regarded as proprietary/confidential where a lessee requests the information to be kept confidential under 43 CFR 3162.8. However, she maintains that "information certainly cannot be regarded as confidential if it is used as the basis of a KGS determination" (Appellant's Response at 4, emphasis in original). She argues as follows:

This information would include, at a minimum, the name and location of the wells utilized by the BLM in making its KGS determination, the structure and its extent which is the basis of the KGS determinations, the name and location of the producing wells from that structure, the interval of presumed productivity where multiple overlapping stratigraphic traps are involved, an isopach map or other map which shows the limits of the KGS, and the entire scientific rationale of the BLM in making the KGS determination. None of this information could be maintained as confidential by the BLM since well names, location, producing status, producing interval and other matters may be located in the public records in the Oil Conservation Division offices for the district within which the well is located in the State of New Mexico, nor has confidentiality been requested by a lessee. The other information, including BLM's cross section, is information originating from the BLM and does not reveal any proprietary information. Therefore, the BLM's stated concern that it must reveal confidential information is unfounded. Most, if not all, of the information which BLM is claiming is confidential has not been so marked by a lessee or is beyond the 12-month confidentiality period. * * * Appellant's geologist cannot commence or fully complete his analysis until he is informed of the above information.

(Appellant's Response at 4-5).

We deem it appropriate to interpret 43 CFR 3162.8 in light of Southern Union Exploration Co., 51 IBLA 89 (1980) (Southern Union II), in which the Board addressed the subject of what information BLM may properly withhold as proprietary and confidential in rejecting the high bid to lease a parcel of land under the competitive oil and gas lease procedures. In Southern Union Exploration Co., 41 IBLA 81 (1979), the Board set aside the BLM decision and remanded the case for compilation of a more complete record and readjudication of the bid. BLM requested a new evaluation report by Geological Survey which was provided by memorandum. The appellant requested a copy of the memorandum, but BLM did not provide it on the basis that it was proprietary and confidential. In Southern Union II, the Board ruled that BLM had improperly withheld the memorandum, providing the following rationale:

The main thrust of our earlier decision in this case, which both BLM and Survey have evidently missed, is that the appellant is entitled to a reasoned and factual explanation for the rejection of its bid. Appellant must be given some basis for understanding and accepting the rejection or alternatively appealing and disputing it before this Board. The explanation provided must be a part of the public record and must be adequate so that this Board can determine its correctness on appeal. [Citations omitted].

51 IBLA at 92. See Craig Folson, 82 IBLA 294, 296 (1984). This reasoning applies when BLM rejects a noncompetitive oil and gas lease offer drawn with first priority on the basis that the lands are within a KGS area.

In Southern Union II, the Board defined "proprietary" or "confidential" information as that which, "if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would also inhibit the Government's ability to obtain this type of information in the future resulting in a substantial detrimental effect to the oil and gas leasing program." 51 IBLA at 93. The Board stated that "[t]he term 'proprietary' should not be applied to internally generated Government information * * *." Id. The Board held that "except to the extent prohibited by law, [1/] an appellant who has submitted a high bid, which is not clearly spurious, must be informed not only of the estimated minimum values,

^{1/} While there is an exemption under the Freedom of Information Act (FOIA) for "geological and geophysical information and data, including maps, concerning wells" (5 U.S.C. § 552(b)(9) (1982)), FOIA exemptions are permissive, not mandatory, allowing an agency having control over the exempted information discretion to disclose or withhold it. Westchester General Hospital, Inc. v. Department of Health, Education, & Welfare, 464 F. Supp. 236, 239 (M.D. Fla. 1979). This Board has taken the position that "[a] distinction is properly drawn between proprietary information prohibited by law from public disclosure, see Trade Secrets Act, 18 U.S.C. § 1905 (1982), and the broader scope of information which may be withheld from public disclosure under FOIA." Craig Folson, supra at 297 n.1. See Westchester General Hospital, Inc. v. Department of Health, Education, & Welfare, supra at 251.

but the subsidiary factual data which served as the predicate for the derivation of that estimate." Id. at 95. The Board ruled that the Geological Survey memorandum requested by the appellant in Southern Union Exploration Co. could not be kept secret for two reasons: (1) the memorandum amounted to internally generated Government information, and (2) because BLM referenced that memorandum in its decision, thereby incorporating its contents into the decision, such memorandum should have been disclosed to appellant.

We have reviewed those items which BLM marked "Proprietary and Confidential" and submitted to the Board. They bear the stamp "FOR U.S. GOVERNMENT USE ONLY." However, BLM has made no showing that the information is prohibited by law from public disclosure. See Craig Folson, supra at 297. We are unable to discern what criteria BLM applied in determining what information should be disclosed and what should be withheld under 43 CFR 3162.8. In its response, counsel for BLM explained that certain items of information, while attached as exhibits to the February 20, 1986, memorandum from the Roswell District Office to the Field Solicitor, were not being sent to appellant. However, appellant did receive the February 20, 1986, memorandum. Among those items not sent to appellant was the geologic report upon which BLM determined the subject lands were within a KGS. We note that major portions of the memorandum were lifted verbatim from the geologic report. We fail to comprehend how BLM could withhold the geologic report from the appellant on the basis that it is confidential, and then include the critical, informational paragraphs of that report in a memorandum which is released to the appellant. We reject this arbitrary reading and application of 43 CFR 3162.8. As in Southern Union II, by referencing the geologic report, BLM incorporated it into its memorandum and should have disclosed it.

While it was error for BLM to withhold the geologic report, the contents of that report were disclosed to appellant in the guise of the memorandum from the Roswell District Office to the Regional Solicitor. Appellant responded thoroughly to that memorandum. Eventually, BLM did disclose to appellant the factual basis for its KGS determination in this case. Accordingly, we will now review, in light of the entire record, the question whether appellant proved by a preponderance of the evidence that BLM erred in its KGS determination. 2/

2/ We note that effective Jan. 9, 1989, the Office of Hearings and Appeals, U.S. Department of the Interior (OHA), promulgated a final rule for purposes of "revising its rules at 43 CFR Part 4, Subpart B, by adding a new provision to establish a procedure enabling a party to an administrative proceeding to submit privileged or confidential information as evidence and request limitation on the disclosure of that evidence," and to revise "[c]ertain existing regulations * * * to include references to the new provision." 53 FR 49658 (Dec. 9, 1988). OHA added a new section, 43 CFR 4.31, to Subpart B, which establishes more specific procedures than those outlined in 43 CFR 3162.8, "for submitting documents containing confidential information and for requesting limitation on the disclosure of such documents." 53 FR at 49659. OHA amended 43 CFR 4.24(a)(4), which previously provided that "no decision after a hearing or on appeal shall be based upon

[2] Section 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 226(b) (1982), provides that "[i]f the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible bidder by competitive bidding * * *." See 43 CFR 3100.3-1; 43 CFR Subpart 3120 (concerning competitive leases). The regulation specifically governing rejection of a simultaneous noncompetitive oil and gas lease application for lands within a KGS provides:

If prior to the time a lease is issued, all or part of the lands in the offer are determined to be within a known geological structure of a producing oil or gas field, the offer shall be rejected in whole or in part as may be appropriate and the lease, if issued, shall include only those lands not within the known geological structure of a producing oil or gas field.

43 CFR 3112.5-2(b). It is well settled that a noncompetitive lease application for lands designated within a KGS must be rejected where lands embraced in that application are designated as within a KGS prior to issuance of the lease. See, e.g., Lawrence A. Egan, 104 IBLA 57 (1988); Leonard Luning, 87 IBLA 123 (1985); John P. Brogan, 85 IBLA 379 (1985); Evelyn Ruckstuhl, 85 IBLA 69 (1985). This Department has no authority to issue a noncompetitive lease for lands within a KGS. McDonald v. Clark, 771 F.2d 460 (10th Cir. 1985); McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd*, 494 F.2d 1156 (D.C. Cir. 1974).

[3] An applicant for an oil and gas lease who challenges a determination that certain lands are situated within the KGS of a producing oil and gas field has the burden of showing the determination is in error. Lawrence A. Egan, *supra*; Evelyn D. Ruckstuhl, *supra*; Reed International, 80 IBLA 145 (1984); R. C. Altrogge, 78 IBLA 24 (1983). The burden on appellant is to show by a preponderance of the evidence that the determination is erroneous. See Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984).

The term "known geological structure" is defined as "technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive." 43 CFR 3100.0-5(1). The Secretary of the Interior has historically delegated the responsibility for determining the existence and extent of a KGS to his technical expert in the field.

fn. 2 (continued)

any record, statement, file or similar document which is not open to inspection by the parties to the appeal or hearing," to provide an exception "for documents or other evidence received or reviewed pursuant to § 4.31(d)." 53 FR at 49660. Any person submitting a document in a proceeding under 43 CFR Part 4, other than a hearing conducted pursuant to 5 U.S.C. § 554 (1982), may claim, in accordance with procedures announced in 43 CFR 4.31(d), that disclosure of information in that document to another party to the proceeding is prohibited by law. 53 FR at 49661.

When that expert makes a determination that lands qualify for a KGS, the Secretary is entitled to rely upon that reasoned opinion. Bruce Anderson, 63 IBLA 111 (1982). The Board has held that a KGS determination reflects the existence of a continuous entrapping structure on some part of which there is production, or of numerous related but nevertheless independent stratigraphic as well as structural traps. A KGS designation of certain land may be made on the basis of drill stem tests, not just completed producing wells, which indicate that a reservoir which extends under such land is productive. Thunderbird Oil Corp., 91 IBLA 195 (1986), aff'd sub nom. Planet Corp. v. Hodel, Civ. No. 86-679 HB (D.N.M. May 6, 1987). However, as counsel for BLM has noted in the instant case, it is not a guarantee that all lands included therein are commercially productive. See, e.g., Lawrence E. Egan, supra; Evelyn D. Ruckstuhl, supra; Robert G. Lynn, 61 IBLA 153 (1982).

The competing arguments of appellant and BLM in the instant case focus upon whether the lands at issue are "presumptively productive." The Board's discussion of the meaning of that phrase in Thunderbird Oil Corp., supra, places many of those arguments in perspective:

It has occasionally been argued that since, by definition, all acreage included in a KGS is "presumptively productive," it is necessary to show that acreage is "presumptively productive" before it can be included within a KGS. This is not correct. Acreage included in a KGS is presumptively productive by the mere fact of its inclusion. In other words, when land is placed within a KGS the effect of the placement is to give rise to a presumption of productivity. Such land is presumptively productive because it has been properly included in a KGS rather than having been included because it is presumptively productive. While this may be a fine point it has a major effect on consideration of KGS appeals. Thus, BLM is not required to show that land included in a KGS is presumptively productive. Rather, it must merely establish that a producing structure exists which extends to the land in question. By establishing this fact, BLM necessarily establishes that the land is presumptively productive. An appellant challenging such a determination must either show that the producing structure does not underlie the land or affirmatively establish, as a fact, that the land involved is not productive from the structure in question.

Admittedly, where the trap is stratigraphic rather than structural, determination of the extent of a KGS is more problematic. Inasmuch as a stratigraphic trap is normally occasioned by facies changes altering porosity and permeability in the reservoir rock, the proper limit of a KGS is open to wide differences of opinion. So it is in the instant case.

91 IBLA at 202.

In Thunderbird Oil Corp., *supra*, the appellant, based upon a report prepared by LeMay, argued that there was no continuous entrapping structure under the lands included in lot 4, SE 1/4 NW 1/4, E 1/2 SW 1/4, SE 1/4, sec. 7, SW 1/4 SE 1/4, sec. 13, T. 22 S., R. 32 E., New Mexico Principal Meridian, Lea County, New Mexico, and took issue with BLM's contention that the lands were underlain by a stratigraphic entrapping mechanism consisting of multiple, overlapping producing sands. Not only did appellant in the instant case make the same arguments, but such arguments relate to the Morrow Formation, which was also at issue in Thunderbird Oil Corp., *supra*. In rejecting those arguments in Thunderbird, the Board relied upon Angelina Holly Corp., *supra*, 3/ and Robert L. Lyon, 66 IBLA 141 (1982), in which the appellants in those cases challenged the KGS extensions for the same reason pressed in Thunderbird, and which appellant argues herein, "namely, that BLM had failed to establish that a specific trap underlay the land sought but had simply relied on the fact that numerous successful completions had occurred in an admittedly highly fractured fault system." 91 IBLA at 203. In both cases, as in Thunderbird, the Board rejected this argument. We reject that argument again in this case. Accordingly, we conclude that BLM properly included the subject lands in the undefined addition to the Malaga KGS.

Accordingly, we agree with the conclusions offered by counsel for BLM, set forth below:

[T]he case at hand involves a difference of opinions; the appellant has not shown that her interpretation of the data is more likely correct than that of the Bureau, B. K. Killion, 90 IBLA 378, 386 (1986), nor has she shown by a preponderance of the evidence that the Bureau's decision is in error, Vera Kochergan, 99 IBLA 194, 200 (1987); Beard Oil Corp., 99 IBLA 41, 45 (1987). The Bureau's Known Geologic Structure determination was properly made, and should be upheld.

(Memorandum dated Mar. 18, 1988, from the Roswell District Manager, BLM, to the Field Solicitor, at 2 (submitted to the Board as a Second Supplemental Filing)). Appellant has failed to prove by a preponderance of the evidence that BLM's KGS determination was in error.

In her SOR, appellant requested "a hearing with a complete record * * * because probative evidence is submitted which raises a factual question as to 'presumptive productivity'" (SOR at 9). In light of our ruling herein, we deny appellant's request for a hearing. *See* Thunderbird Oil Corp., *supra* (hearing requested and denied by the Board).

3/ In Angelina Holly Corp. v. Clark, 587 F. Supp. 1152 (D.D.C. 1984), the district court affirmed the Board's determination that the subject lands were properly included within a KGS.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge